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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/581,520	06/23/2000	GUNTHER SAWATZKI	REF/SAWATZKI/409	1702

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EXAMINER

AZPURU, CARLOS A

ART UNIT	PAPER NUMBER
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1615

DATE MAILED: 04/28/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/581,520	Applicant(s) SAWATZKI ET AL.	
	Examiner Carlos A. Azpuru	Art Unit 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-14 and 18-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-14 and 18-24 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Receipt is acknowledged of the amendment and remarks filed 03/04/2004.

The rejections under 35 USC, second paragraph, and 35 USC 103 (a) are hereby withdrawn.

The following are new rejections of the claims:

Claim Objections

Claim 1 is objected to because of the following informalities: In line 6, "perg" should instead read "per g". Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-3, 5-14, 18-24 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Upon review of the specification and claims, it is unclear as to the composition of the fat blend. For example, the fat

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blend is said to consist of oils, fats, lecithins and fatty acid salts and esters. However, the claim goes on to say that the composition contains gamma-linolenic, stearidonic, eicosapentanoic and arachidonic acids. Are these unsaturated fatty acids found only when the "at least one component" is a fatty acid? Or are these found in addition to the at least one component even when that component is not a fatty acid. Further, why is arachidonic not listed among the polyunsaturated fatty acids which characterize this component? The statement "with the proviso that the fat blend contains arachidonic acid" may refer to the case where fatty acids are selected, but the claim wording may also read on a component in addition to any of those selected from the Markush Group. While the specification seems to explain the importance of having these components together in a preferred embodiment, it is unclear whether they are always found in the claimed composition. Clarification is requested as to the components which must be present in the fat blend, and those which are optional depending on which component is selected.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-3, 5-14, 18-24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims are indefinite in that they do not particularly point out the exact composition of the fat blend. In particular, in addition to the "at least one component",

are the polyunsaturated fatty acids gamma-linolenic, stearidonic, eicosapentanoic found only when that component is selected from fatty acids? Or are these found in addition to the "at least one component"? Further, why is arachidonic not listed among the polyunsaturated fatty acids which characterize this component? The statement "with the proviso that the fat blend contains arachidonic acid may refer to the case where fatty acids are selected, but the claim wording may also read on a component in addition to any of those selected from the Markush Group. Clarification is requested as to what the composition actually entails.

Claim 5 is particularly indefinite in that it is unclear whether the phospholipids are 40% of the fatty acids or the entire fat blend. Language in the parentheses should be also be removed and incorporated into the claim language. Clarification is requested.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 9-14, 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over EP 0 843 972 A1 (EP'972).

EP'972 discloses a fat blend which may contain fatty acids (see Abstract). Among these are polyunsaturated fatty acids which comprise 5-25 wt%. These include stearidonic, eicosapentaenoic and gamma linolenic acids (see Abstract; page 3, lines

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17-20). The amount in grams of the polyunsaturated fatty acids is 5-25 grams per 100 g of the fatty acids (see page 2, line 52). These blends may be used in a nutritional composition (see page 2, lines 41-42; claims) and may further be in the form of a liquid or powder (see page 5, lines 25-27). The composition further contains an energy density of at least 1.0 kcal/ml, while fat content is preferable 28-38% (see page 5, lines 26-27). Therefore it is apparent that the composition contains the same components in the same major components and is used for the same art recognized purpose. The reference lacks the weight percentages of arachidonic to the total of gamma-linolenic, stearidonic, and eicosapentanoic acids, as well as percentages of all these components in relation to each other.

However, it is evident that applicant has taken a well known composition and modified the percentages of the known components in order to obtain desired results. Thereofre, while the reference does not expressly disclose applicant's claimed weight percentages for each fatty acid component, differences in concentration will not support the patentability of subject mater encompassed by the prior art unless there is evidence indicating such concentrations are critical. When the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation. *In re Aller*, 22 F.2d 454, 105 USPQ 233, 235 (CCPA 1955). According to he MPEP, section 2112.01, "where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by the identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430,

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433 (CCPA 1977). 'When the PTO shows a sound bases for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.' *In re Spada*, 1911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Therefore the prima facie case can be rebutted by evidence showing that the prior art products do not necessarily possess the characteristics of the claimed product." This must be done without the addition of new matter. It is the position of this examiner that the percent limitations not taught by EP'972 would could have been determined by routine experimentation by one of ordinary skill in the art absent the presentation of unusual and/or unexpected results. These results must be those that accrue from the specific limitations. As such, the instant claims would have been obvious given the teachings of EP'972.

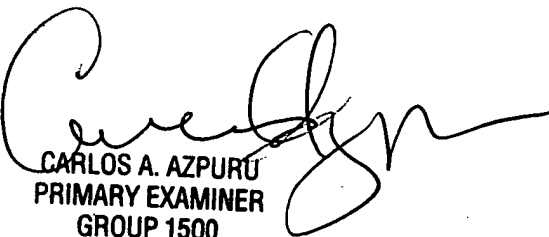
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carlos A. Azpuru whose telephone number is (571) 272-0588. The examiner can normally be reached on Tu-Fri, 6:30 am - 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman K. Page can be reached on (571) 272-0602. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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